Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

MARCUS JEFFREY BARNHARDT,

Petitioner,

v.

EDWARD S. ALAMEIDA,
Director of the California Department of Corrections,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether petitioner was deprived of his Sixth Amendment right to effective assistance of trial counsel when appointed counsel failed to present the defense of accident and misfortune, and to litigate and request jury instructions on the lesser offense of involuntary manslaughter (unintentional homicide occurring due to criminal negligence or during the commission of a misdemeanor). These theories were supported by petitioner's own testimony, but were abandoned by counsel, who argued the separate, inconsistent, and factually unsupported theories that petitioner acted in reasonable self-defense, or had an actual and good faith but unreasonable belief in the necessity to use deadly force in self-defense.

II.

Whether petitioner was deprived of his Sixth Amendment right to effective assistance of appellate counsel when his appointed attorney failed to seek appellate relief based on trial counsel's ineffective performance, and failed to argue that the trial court had a *sua sponte* duty to instruct on the defense of accident, and on the lesser-included offense of involuntary manslaughter.

LIST OF PARTIES

The parties are petitioner Marcus Jeffrey Barnhardt and respondent Edward S. Alameida, Director of the California Department of Corrections.

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Appendix C — Report And Recommendation Of The United States District Court For The Central District Of California Dated And Filed August 30, 2004 ..... 4a

Petitioner Marcus Jeffrey Barnhardt respectfully prays that a writ of *certiorari* issue to review the judgment below.

OPINION BELOW

The order of the United States Ninth Circuit Court of Appeals denying petitioner's application for a certificate of appealability appears at Appendix A, and is unpublished. The judgment of the United States District Court for the Central District of California, for which a certificate of appealability was sought, appears at Appendix B and was unpublished. The Report and Recommendation of United States District Court Magistrate Judge Ralph Zarefsky, filed on August 30, 2004, recommending denial of the habeas corpus petition, which constitutes the opinion for which petitioner sought a certificate of appealability in the Ninth Circuit, appears at Appendix C, and was unpublished.

STATEMENT OF JURISDICTION

This Court has jurisdiction pursuant to Title 28 U.S.C. § 1254, subdivision (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Title 28 U.S.C. § 2253, subsection (c) provides, in relevant part:

> (1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from –